

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC No. DAR _____

AC No. 2020-P-0929

Hampden, ss.

TED DECOSMO, PLAINTIFF-APPELLANT,

v.

BLUE TARP REDEVELOPMENT, LLC D/B/A
MGM SPRINGFIELD & MGM SPRINGFIELD, LLC,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

**PLAINTIFF-APPELLANT TED DECOSMO AND
DEFENDANTS-APPELLEES BLUE TARP REDEVELOPMENT, LLC
D/B/A MGM SPRINGFIELD AND MGM SPRINGFIELD, LLC'S
JOINT APPLICATION FOR DIRECT APPELLATE REVIEW BY
THE SUPREME JUDICIAL COURT**

I. Request for Direct Appellate Review

The parties to this appeal, Plaintiff-Appellant, Ted DeCosmo, and Defendants-Appellees Blue Tarp Redevelopment, LLC d/b/a MGM Springfield and MGM Springfield, LLC (collectively, "MGM Springfield") jointly request direct appellate review by the Supreme Judicial Court pursuant to Rule 11(a) of the Massachusetts Rules of Appellate Procedure. The parties seek direct appellate review on a single,

purely legal issue over which there is currently a split of lower-court authority: whether the Rules of Blackjack ("Blackjack Rules") promulgated by the Massachusetts Gaming Commission ("MGC") permit a gaming licensee such as MGM Springfield to choose the option of paying a blackjack at 6 to 5 odds without using the 6-to-5 blackjack variation.

This joint application thus squarely presents a novel, unsettled question of state law that can be definitely resolved only by this Court. Moreover, this pure legal question is of vital importance to the public interest. At present, all interested parties – the MGC, each of the gaming licensees in this commonwealth, plaintiffs in multiple class actions, and the gaming public at large – are unable to determine whether a gaming licensee must pay blackjack at 3 to 2 odds unless playing by the 6-to-5 blackjack variation in the Blackjack Rules. Direct appellate review by this Court will clarify this uncertainty once and for all with the finality that only a decision of this Court can provide.

II. Statement of Prior Proceedings

Shortly after a class action was filed against the owners and operators of the Encore Boston Harbor resort and casino ("Encore") challenging the manner in which Encore offered blackjack gaming (the "Encore Litigation"), Plaintiff-Appellant, Ted DeCosmo ("DeCosmo"), filed a similar class action against MGM Springfield.¹ DeCosmo's complaint contained an identical claim to the one asserted in the Encore Litigation: that MGM Springfield was offering blackjack gaming that was not in compliance with the Blackjack Rules because it paid a blackjack at 6 to 5 odds without using the 6-to-5 blackjack variation authorized by those rules.

MGM Springfield moved to dismiss the amended complaint, arguing that (1) the Blackjack Rules expressly permitted a gaming licensee to choose to pay blackjack at 6 to 5 odds without using the distinct 6-to-5 blackjack variation, so long as the selected payout is displayed on the table's layout in plain

¹ DeCosmo's initial complaint named MGM Springfield, LLC as the defendant. DeCosmo amended his complaint to substitute as the defendant the correct entity that holds the gaming license for MGM Springfield: Blue Tarp Redevelopment, LLC d/b/a MGM Springfield.

sight; and (2) MGM Springfield's proffered interpretation of the Blackjack Rules was the same as the MGC's own interpretation of the rules that it promulgated. DeCosmo opposed this motion, arguing that the Blackjack Rules and other MGC regulations authorized 6 to 5 payouts for blackjack only where the 6-to-5 blackjack variation is used.

The Superior Court (Ferrara, J.) granted MGM Springfield's motion to dismiss on June 29, 2020.² DeCosmo timely appealed from the dismissal of the amended complaint. The Appeals Court docketed this appeal on August 19, 2020. This joint application was timely filed within twenty-one days after the appeal was docketed in the Appeals Court.

III. Statement of Facts

A. The Provisions of the Blackjack Rules at Issue.

Gaming licensees in this Commonwealth are permitted to offer "[o]nly those table games and their rules authorized by the [MGC] and posted on the [MGC]'s website." 205 C.M.R. § 147.02. For the game of blackjack, the MGC has promulgated the Blackjack

² In accordance with Rule 11(b) of the Massachusetts Rules of Appellate Procedure copies of the relevant docket entries and the Superior Court's written decision are appended to this application.

Rules and posted them on the MGC's website. The parties to this appeal place principal reliance on different provisions of the Blackjack Rules with respect to the issue of the permitted payouts for a blackjack.³

DeCosmo places principal reliance on Sections 3(e), 7(a), and 7(b) of the Blackjack Rules. Section 3(e) provides, in pertinent part, "[a]ll winning wagers made in accordance with [Section 3(a)] . . . shall be paid at odds of 1 to 1 with the exception of standard blackjack which shall be paid at odds of 3 to 2, or at odds of 6 to 5 for the 6 to 5 blackjack variation." See Add. 55. Section 7(a) provides, in pertinent part, "If the first face up card dealt to the dealer is a 2, 3, 4, 5, 6, 7, 8, or 9 and a player has blackjack, the dealer shall announce and pay the blackjack at odds of 3 to 2." See Add. 62. Section 7(b) provides, in pertinent part, "If the first face up card dealt to the dealer is an Ace, King, Queen,

³ Under the Blackjack Rules, a "blackjack" is defined as "an ace and any card having a point value of 10 dealt as the initial two cards to a player or a dealer except that this shall not include an ace and a ten point value card dealt to a player who has split pairs." Blackjack Rules, § 1. The Blackjack Rules are included in their entirety in the addendum at Add. 53-93.

Jack or Ten and a player has a blackjack, the dealer shall announce the blackjack but shall make no payment nor remove any cards until all other cards are dealt to the players and the dealer receives his second card. If, in such circumstances, the dealer's second card does not give him blackjack, the player having blackjack shall be paid at odds of 3 to 2." See Add. 62.

MGM Springfield, by contrast, places principal reliance on Section 7(d) of the Blackjack Rules, which provides: "If the licensee chooses the option to pay a blackjack at odd of 6 to 5 and doesn't use the 6 to 5 variation, then Section 7(c) is void. If the licensee uses this option on 6 or 8 deck games, this variation's rules must be displayed on the layout in plain sight." See Add. 62.

B. Blackjack Gaming at MGM Springfield.

According to the allegations of the Complaint, MGM Springfield, a resort and casino "with world-class amenities," Add. 21 (1st Am. Compl. ("Compl."), ¶ 4), opened to the public on August 24, 2018, Add. 21 (Compl., ¶ 6). MGM Springfield offers blackjack to its patrons, and some of its blackjack tables pay blackjack at 6 to 5 odds. Add. 21, 28 (Compl., ¶¶ 8,

56). The tables at which blackjack is paid at 6 to 5 odds bear a notation on the table delineating those payout odds. Add. 28 (Compl. at ¶ 59 ("MGM has blackjack tables that have imprinted on them that blackjack pays at odds of 6:5.")). It is undisputed that MGM Springfield does not utilize the version of the blackjack game known as the 6 to 5 blackjack variation. Add. 28 (Compl., ¶ 59).

C. The Encore Litigation, This Litigation, and the Conflicting Lower-Court Decisions.

Shortly after the grand opening of Encore, a class-action complaint was filed against the operators of that resort and casino concerning, among other things, Encore's 6 to 5 payouts for blackjack. See Add. 381 (Mem. & Order on Mot. to Dismiss ("Schuster Order") 2, Schuster v. Encore Boston Harbor, C.A. No. 19-cv-11679-ADB (July 9, 2020)). According to the allegations of the operative complaint in the Encore Litigation, Encore, similar to MGM Springfield, pays blackjack at 6 to 5 odds at some of its tables without using the 6-to-5 blackjack variation. Add. 382 (Schuster Order, at 2).

Soon after the complaint in the Encore Litigation was filed, the MGC's Investigation and Enforcement

Bureau ("IEB") conducted an investigation of the allegations in the Encore Litigation. Add. 95 (July 18, 2019 Report Regarding Schuster v. Encore Boston Harbor – Blackjack/Slot Payout Compliance ("IEB Report") 1.) The IEB issued a report of its investigation, which set out its interpretation of the Blackjack Rules and indicated that the IEB had "preliminarily found Encore to be in compliance with the [MGC's] rules and regulations for paying out blackjack wins." Add. 95 (IEB Report 1).

The MGC also held a public hearing concerning the allegations of the Encore Litigation. At this hearing, the IEB presented its preliminary findings and several MGC commissioners spoke. Add. 114-33 (Transcript of July 18, 2019 MGC Meeting ("MGC Meeting Tr."), 14:6-33:2).

DeCosmo filed this class action against MGM Springfield shortly after the Encore Litigation was filed. MGM Springfield moved to dismiss the complaint, and the trial court granted that motion. The court agreed with MGM Springfield that "Section 7(d) [of the Blackjack Rules] explicitly states that a casino may choose to pay out a blackjack at a ratio of 6:5 without utilizing the 6:5 variation of the game."

Add. 376 (Mem. of Decision & Order 4). The court further determined that DeCosmo's "reading of the [Blackjack] Rules would render the language in Section 7(d) superfluous. The plain language of Section 7(d) contemplates the option for casinos to offer the 3:2 variation of blackjack, but pay out a blackjack win at 6:5." Add. 376-77 (Mem. of Decision & Order 4-5). The Court explained that "[o]ne would have to completely ignore Section 7(d) under [Plaintiff's] interpretation." Add. 377 (Mem. of Decision & Order 5). The Court therefore determined that "the allegations in Plaintiff's Amended Complaint are legally insufficient" because "MGM [Springfield] is not operating in violation of the Blackjack Rules." Add. 378 (Mem. of Decision & Order 6).

Meanwhile, the defendants in the Encore Litigation had also moved to dismiss that complaint, making similar arguments to those offered by MGM Springfield in its motion to dismiss. After the Superior Court's order in this case, which was considered, the district court entered an order denying the motion to dismiss, concluding that the plaintiff in that case "has made a plausible claim as to Encore's potential violation of the MGC's rules

regarding the appropriate payout odds on 'a blackjack,' or, in the alternative, Encore's failure to comply with the notice requirements of Section 7(d) regarding even-money insurance wagers." Add. 397 (Schuster Order 17). The district court judge has recently directed the parties to submit a proposed question that the district judge can certify to this Court concerning the question of permissible blackjack payouts under the Blackjack Rules. See Add. 404-05.

Therefore, at present, courts are split on the narrow issue of law that is the subject of this joint DAR application.

**IV. Statement of Issues of Law on Appeal;
Preservation of Issues of Law in Lower Court**

The narrow issue of law raised by DeCosmo's appeal is whether the Blackjack Rules permit a gaming licensee such as MGM Springfield to choose the option of paying a blackjack at 6 to 5 odds without using the 6-to-5 blackjack variation. This issue was raised and preserved by both parties in the Superior Court; it was the subject of the parties' briefing in connection with MGM Springfield's motion to dismiss, and it was the dispositive issue decided by the Superior Court in granting that motion. See, e.g., Add. 38-313 (MGM

Springfield's Memorandum in Support of Its Motion to Dismiss ("Mot. to Dismiss Mem.") 6-13); Add. 314-34 (DeCosmo's Opposition ("Opposition") 3-20); Add. 373-80 (Order).

V. Statement with Respect to Parties' Positions on the Issue for which Direct Appellate Review is Sought.

Because this a joint application for direct appellate review, the parties jointly state that they will argue in their merits briefs on appeal consistently with the arguments made in their memoranda of law filed in the Superior Court.

Specifically, DeCosmo will argue that MGM Springfield's 6 to 5 blackjack payouts without using the 6-to-5 blackjack variation are unlawful because (1) the Blackjack Rules explicitly require payment of 3 to 2 odds unless the 6-to-5 blackjack variation is used; and (2) such payouts are also prohibited by 205 C.M.R. § 146.13. See Add. 316-33 (Opp'n 3-20).

MGM Springfield will argue that its 6 to 5 blackjack payouts are lawful because (1) the Blackjack Rules explicitly permit a gaming licensee to choose the option to pay blackjack at 6 to 5 odds without using the 6 to 5 blackjack variation so long as the selected payout is displayed on the table in plain

sight; and (2) to the extent there is any ambiguity in the Blackjack Rules on this issue, the MGC's interpretation of its own rules is entitled to judicial deference. See Add. 43-50 (Mot. to Dismiss Mem. 6-13); Add. 336-40 (Reply in Support of Mot. to Dismiss 1-5).

VI. Reasons Why Direct Appellate Review Is Appropriate

Direct appellate review is warranted on this narrow issue of state law for several reasons. First, the issue of permissible blackjack payouts under the Blackjack Rules is unsettled as a result of the conflicting decisions on this issue. As a result of this uncertainty, the MGC, MGM Springfield, Encore, plaintiffs in two parallel class actions, and the gaming public at large cannot determine whether the blackjack payouts at 6 to 5 odds that are offered at MGM Springfield and Encore are lawful. Therefore, "justice requires a final determination by the full Supreme Judicial Court." Mass. R. App. P. 11(a)(3).

In addition to the public interest in resolving the conflict in the courts, the issue of permitted blackjack payouts is a question of first impression for this Court and raises a novel question that is purely one of state law. See Mass. R. App. P.

11(a)(1). As the last word on matters of state law, this Court should grant direct appellate review to definitively and finally resolve this issue.

VII. Conclusion

For the foregoing reasons, the parties jointly respectfully request that this Court grant their joint application for direct appellate review.

Respectfully submitted,

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By his attorneys,

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Dated: September 9, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this Application complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 11 (direct appellate review);
Rule 16(a)(6) (pertinent findings or memorandum of decision);
Rule 16(e) (references to the record);
Rule 16(f) (reproduction of statutes, rules, regulations);
Rule 16(h) (length of briefs);
Rule 18 (appendix to the briefs); and
Rule 20 (type size, margins, and form of briefs and appendices).

I further certify that the foregoing application complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 point, ten and one-half (10½) characters per inch, and contains fewer than ten (10) total non-excluded argument pages prepared with Microsoft Word 2013.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on September 9, 2020 I have made service of this Application upon the attorney of record for each party, by email and the Electronic Filing System on:

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